

11-2002

Family Law

Elizabeth P. Coughter

Michie, Hamlett, Lowry, Rasmussen & Tweel, P.C.

Ronald R. Tweel

Michie, Hamlett, Lowry, Rasmussen & Tweel, P.C.

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

 Part of the [Evidence Commons](#), [Family Law Commons](#), [Juvenile Law Commons](#), [Legislation Commons](#), [State and Local Government Law Commons](#), [Taxation-State and Local Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Elizabeth P. Coughter & Ronald R. Tweel, *Family Law*, 37 U. Rich. L. Rev. 155 (2002).

Available at: <https://scholarship.richmond.edu/lawreview/vol37/iss1/9>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

FAMILY LAW

Elizabeth P. Coughter *

Ronald R. Tweel **

I. INTRODUCTION

Developments in Virginia family law over the last year have created uncertainty as to a number of significant issues. Of these, the most significant is the enforceability of self-executing child support provisions in a divorced couple's property settlement agreement. The Supreme Court of Virginia and the Virginia Court of Appeals appear to be at odds on this issue. In *Riggins v. O'Brien*,¹ the Supreme Court of Virginia affirmed the court of appeals in declining to give effect to a provision modifying child support found in the parties' property settlement agreement.² During the same period of time, however, the Virginia Court of Appeals issued the decision of *Shoup v. Shoup*,³ which, in its rehearing en banc, upheld a self-executing child support provision found in the parties' property settlement agreement.⁴ These two decisions are not entirely consistent in their reasoning and will be discussed below.⁵

Significant legislative amendments this past year include interlocutory appeals to the Virginia Court of Appeals,⁶ gross income adjustments for self-employment taxes in child support

* Member, Michie, Hamlett, Lowry, Rasmussen & Tweel, P.C., Charlottesville, Virginia. B.A., 1975, University of Virginia; J.D., 1982, University of Richmond School of Law.

** Member, Michie, Hamlett, Lowry, Rasmussen & Tweel, P.C., Charlottesville, Virginia. B.S., 1968, Hampden-Sydney College, *magna cum laude*; J.D., 1971, University of Virginia School of Law.

1. 263 Va. 444, 559 S.E.2d 673 (2002).

2. *Id.* at 449, 559 S.E.2d at 676.

3. 37 Va. App. 240, 556 S.E.2d 783 (Ct. App. 2001).

4. *Id.* at 254, 556 S.E.2d at 790.

5. See *infra* Part II.A.1.

6. VA. CODE ANN. § 8.01-670.1 (Cum. Supp. 2002).

calculations,⁷ admissibility of therapy records of parties in a custody or visitation proceeding,⁸ juvenile court authority to order psychological or custodial evaluation and drug testing,⁹ and expansion of the definition of marital rape.¹⁰

Frankly, this was not a legislative session that can be considered significant in the area of family law. Often, the Virginia Bar Association ("VBA") Coalition Committee on Family Law Legislation ("Committee") considers it a major success to defeat bills that it considers to be inappropriate.¹¹ This happened again this session when the Committee helped to prevent passage of a bill that would have enacted a rebuttable presumption that both parents should share equally in child rearing responsibilities,¹² two bills that would have required the court to consider the "parental alienation syndrome,"¹³ and a bill that would have substituted the term "managerial parent" for "joint custody and sole custody" and repealed the definition of joint custody.¹⁴ The Committee also defeated a bill requiring a party issuing a subpoena to a teacher compelling him/her to testify at a custody or visitation hearing to assure that the testimony is at a time that does not interfere with the teacher's teaching schedule.¹⁵ Similar to past legislative sessions, there were no bills passed dealing with equitable distribution or grounds of divorce.

7. *Id.* § 20-108.2 (Cum. Supp. 2002).

8. *Id.* § 20-124.3:1 (Cum. Supp. 2002).

9. *Id.* § 16.1-278.15 (Cum. Supp. 2002).

10. *Id.* § 18.2-61 (Cum. Supp. 2002).

11. For additional information about the VBA Coalition Committee on Family Law Legislation, see the VBA's Web site at <http://www.vba.org/section/domestic.htm>.

12. H.B. 831, Va. Gen. Assembly (Reg. Sess. 2002); S.B. 277, Va. Gen. Assembly (Reg. Sess. 2002).

13. H.B. 417, Va. Gen. Assembly (Reg. Sess. 2002); H.B. 1132, Va. Gen. Assembly (Reg. Sess. 2002).

14. H.B. 590, Va. Gen. Assembly (Reg. Sess. 2002).

15. S.B. 545, Va. Gen. Assembly (Reg. Sess. 2002).

II. CHILD SUPPORT

A. Case Law

1. Parental Agreements to Modify Support

Family law practitioners in Virginia breathed a sigh of relief when the Virginia Court of Appeals rendered its en banc decision in *Shoup v. Shoup*.¹⁶ A mere three months later, however, the Supreme Court of Virginia rendered its decision in *Riggins v. O'Brien*,¹⁷ leading to uncertainty as to the validity of self-executing agreements in child support provisions. *Shoup* approved the common practice of incorporating self-executing provisions in divorce agreements to modify child support when future events occur such as a child reaching the age of majority.¹⁸ In *Riggins*, on the other hand, the court failed to enforce a self-executing provision.¹⁹ The inconsistency in these decisions turns on the specific language of the agreement involved.

In *Shoup*, the original appeal²⁰ affirmed the trial court's ruling that the parties' written agreement concerning child support which had been incorporated into the final decree of divorce was void and unenforceable.²¹ However, the rehearing en banc reversed these decisions.²² The parties had a "Custody, Support and Property Settlement Agreement" ("Agreement") which provided, in part, that child support would be reduced upon the emancipation of each child; that is, when a child died, married, became self-supporting, reached age eighteen or otherwise became emancipated, or graduated from high school at the age of nineteen.²³ Upon any change of circumstances, the Agreement provided that the statutory child support guidelines found in Virginia Code sec-

16. 37 Va. App. 240, 556 S.E.2d 783 (Ct. App. 2001) (en banc).

17. 263 Va. 444, 559 S.E.2d 673 (2002).

18. 37 Va. App. at 254, 556 S.E.2d at 790 (en banc).

19. *Riggins*, 263 Va. at 449, 559 S.E.2d at 676.

20. *Shoup v. Shoup*, 34 Va. App. 347, 542 S.E.2d 9 (Ct. App. 2001).

21. *Id.* at 356, 542 S.E.2d at 14.

22. *Shoup*, 37 Va. App. at 254, 556 S.E.2d at 790 (en banc).

23. *Id.* at 245 n.1, 556 S.E.2d at 785 n.1 (en banc).

tion 20-108.2 would be followed.²⁴ This Agreement was incorporated in the parties' final divorce decree.²⁵

The parties had three children.²⁶ When the eldest child graduated from high school, the husband unilaterally reduced his child support payments by one-third.²⁷ When the parties' second child reached the age of eighteen, the husband once again unilaterally reduced child support by another one-third.²⁸ The wife did not object to these reductions until she filed her petition for a rule to show cause for the husband's failure to pay the entire sum of child support as originally stated in the Agreement.²⁹

The trial court held that the provision that provided for modification of child support upon emancipation of each child was void and reasoned that the divorce decree could not be modified by the parties without court approval.³⁰

Upon the en banc review, the court of appeals addressed "foundational principles of Virginia divorce law regarding the divorce court's jurisdiction to determine child support and the rights of parties to resolve those issues by agreement."³¹ The court recognized that the best interests of the children are of paramount importance and the award must be based upon contemporaneous events.³² By the same token, parents have a "well-established and broad right to reach legally binding and enforceable agreements" concerning child support.³³ Such an agreement cannot be disregarded by a trial court in setting an award of child support.³⁴

The court further reasoned that Virginia Code section 20-109.1 placed three limitations on the parties' right to reach an agreement concerning child support.³⁵ First, the provisions of the agreement must be in the best interests of the children.³⁶ Sec-

24. *Id.*; see also VA. CODE ANN. § 20-108.2 (Cum. Supp. 2002).

25. *Shoup*, 37 Va. App. at 244, 556 S.E.2d at 785 (en banc).

26. *Id.* (en banc).

27. *Id.* at 245, 556 S.E.2d at 786 (en banc).

28. *Id.*

29. *Id.* at 246, 556 S.E.2d at 786 (en banc).

30. *Id.*

31. *Id.* at 247, 556 S.E.2d at 786 (en banc).

32. *Id.* at 249, 556 S.E.2d at 787 (en banc).

33. *Id.* at 249-50, 556 S.E.2d at 788 (en banc).

34. *Id.* at 250, 556 S.E.2d at 788 (en banc).

35. *Id.* at 250-51, 556 S.E.2d at 788 (en banc); see also VA. CODE ANN. § 20-109.1 (Repl. Vol. 2000 & Cum. Supp. 2002).

36. 37 Va. App. at 250, 556 S.E.2d at 788 (en banc).

only, the parties' agreement may not prevent a court from exercising its authority to modify the custody and support of the children.³⁷ Finally, the parties may not abrogate by contract their duty to support the children.³⁸

The Virginia Court of Appeals found that the Shoups' Agreement did not circumvent the court's jurisdiction to enforce or modify child support, nor did it contradict public policy.³⁹ Concluding that the parties' Agreement was consistent with Virginia law, the court reversed the trial court.⁴⁰ The holding clearly enunciated the need to enforce such agreements:

A rule requiring parents to return to court for approval of a renegotiated amount of child support, as provided in an agreement that has been affirmed, ratified, and incorporated into an earlier decree, would undermine the Commonwealth's policy in favor of prompt resolution of disputes concerning the maintenance and care of children upon divorce.⁴¹

Therefore, the Agreement providing for both the reduction in child support upon emancipation of each of the parties' minor children and the utilization of child support guidelines to determine the amount of child support was enforceable.⁴²

The concurrence by Judges Agee and Frank acknowledged the common use of "self-executing" child support agreements by family law practitioners in Virginia.⁴³ Such an agreement is intended to eliminate the necessity of having the parties return to court upon the occasion of each child's eighteenth birthday or emancipation.⁴⁴

Practitioners of family law throughout Virginia hailed the reasonableness of the *Shoup* decision, only to be alarmed three months later by the Supreme Court of Virginia's decision of *Riggins v. O'Brien*.⁴⁵ In *Riggins*, the supreme court affirmed the court of appeals and refused to find the provisions regarding child

37. *Id.*

38. *Id.* at 250–51, 556 S.E.2d at 788 (en banc).

39. *Id.* at 252, 556 S.E.2d at 789 (en banc).

40. *Id.* at 253–54, 556 S.E.2d at 789–90 (en banc).

41. *Id.* at 253, 556 S.E.2d at 789 (en banc).

42. *Id.* at 253–54, 556 S.E.2d at 790 (en banc).

43. *Id.* at 255, 556 S.E.2d at 790–91 (Agee, J., concurring).

44. *See id.* (Agee, J., concurring).

45. 263 Va. 444, 559 S.E.2d 673 (2002).

support modification in the parties' agreement enforceable.⁴⁶ John Riggins, a former football player for the Washington Redskins, was held in contempt by the trial court and judgment was awarded in favor of his wife for child support arrearages.⁴⁷ The court of appeals affirmed the trial court's judgment.⁴⁸

In 1991, Mr. and Mrs. Riggins entered into an agreement that specifically set forth the terms of the child support arrangement.⁴⁹ The agreement provided that Mr. Riggins would pay child support at a set sum until a child reached the age of eighteen, married, became self-supporting, otherwise emancipated, or died.⁵⁰ This payment arrangement was subject to a provision "that the amount payable hereunder [will] be renegotiated or submitted to a court for adjudication on the first event of emancipation."⁵¹ When the parties' eldest child reached the age of eighteen, Mr. Riggins reduced the amount of child support by a quarter.⁵² He further reduced his child support obligation by another quarter when the second child became emancipated.⁵³ Court approval was not obtained for either of these reductions in child support.⁵⁴ Mr. Riggins made these reduced payments for over six years without objection from the mother.⁵⁵

The trial court found the provision to be void and held Mr. Riggins in contempt.⁵⁶ As a result, he was liable for child support arrearages in an amount exceeding \$85,000.00 in addition to an amount of prejudgment interest exceeding \$20,000.00.⁵⁷

The Supreme Court of Virginia reviewed the parties' agreement to consider its validity.⁵⁸ The court focused on the language in the agreement requiring the renegotiation or submission to a court for adjudication of child support at the time the first child

46. *Id.* at 449, 559 S.E.2d at 676.

47. *Id.* at 446, 559 S.E.2d at 674.

48. *Id.* at 449, 559 S.E.2d at 676.

49. *Id.* at 446, 559 S.E.2d at 674.

50. *Id.*

51. *Id.* (emphasis added).

52. *Id.* There were four children born of the marriage. *Id.*

53. *Id.* at 447, 559 S.E.2d at 674.

54. *Id.*

55. *Id.* at 447 n.1, 559 S.E.2d at 674-75 n.1.

56. *Id.* at 447, 559 S.E.2d at 675.

57. *Id.*

58. *Id.*

became emancipated.⁵⁹ Highlighting the importance of the welfare of the child, the court held that

[t]he responsibility of a divorce court to review child support amounts is necessary to ensure that the child's welfare is adequately addressed and protected given the circumstances of the parents. With the exception of terminating a non-unitary support award upon achieving majority, specifying future changes in the amount of child support is inappropriate because it does not allow the divorce court to determine child support based on contemporary circumstances.⁶⁰

Considering the Rigginses' agreement, the supreme court reasoned that when the lower court said that "child support could be renegotiated, the court meant that, upon agreement of the parties, a consent decree could be presented to the court for entry or, in the event that the parties could not reach an agreement, the court would adjudicate the matter"⁶¹ Therefore, the "requirement [was] implicit in the divorce court's decree" and "any renegotiation would be subject to court approval."⁶² The court concluded that Mr. Riggins was obligated to pay arrears since "the parties did not obtain court approval for their renegotiations."⁶³ This decision seemed to turn upon the conclusion that if renegotiations had taken place, a consent decree had to follow. As highlighted in the dissent, the express language of the decree did not seem to require entry of a consent decree upon renegotiation.⁶⁴

In the dissenting opinion, Justices Koontz and Kinser opined that the court of appeals probably would not find the Rigginses' child support provision to be void considering its recent decision of *Shoup v. Shoup*.⁶⁵ The dissent disagreed with the majority's conclusion that any renegotiation had to be subject to court approval.⁶⁶ Relying on the express language of the decree, the dissent found that the parties were directed to renegotiate child

59. *Id.*

60. *Id.* at 448, 559 S.E.2d at 675.

61. *Id.*

62. *Id.* at 449, 559 S.E.2d at 676.

63. *Id.*

64. *Id.* at 450, 559 S.E.2d at 676 (Koontz, J., dissenting).

65. *Id.* at 449, 559 S.E.2d at 676 (Koontz, J., dissenting) (citing *Shoup v. Shoup*, 37 Va. App. 240, 556 S.E.2d 783 (Ct. App. 2001) (en banc)). It is interesting to note that the majority never referenced *Shoup*. See *id.* at 446-49, 559 S.E.2d at 673-76.

66. *Id.* at 450, 559 S.E.2d at 676 (Koontz, J., dissenting).

support upon the specific emancipation of the children.⁶⁷ The dissent also reasoned that such emancipating events were not inconsistent with the best interests of the children and not in violation of any statute.⁶⁸ The analysis focused on the express language of the divorce decree, which provided that in the absence of a successful renegotiation of child support, the disjunctive "or" provision applied.⁶⁹ The parties either successfully renegotiated the child support or, failing to renegotiate, would adjudicate the matter.⁷⁰ The majority, according to the dissent, "effectively converts the disjunctive 'or' into the conjunctive 'and.'"⁷¹ The dissenting justices would have reversed and remanded the case with instructions to determine whether or not renegotiations had occurred.⁷²

Can *Riggins* be reconciled with *Shoup*? One difference between the two opinions is that the agreement in *Shoup* provided for a method of calculating the new child support obligation upon the emancipation of a child by referencing the utilization of the statutory guidelines.⁷³ There is no reference to the guidelines in *Riggins*. The authors of this article feel that this is a potentially critical difference.

The fathers in both cases appear to have reduced child support unilaterally without the approval of the mothers, creating an additional ambiguity.⁷⁴ The renegotiation is implied in *Riggins* as the court remarked that the mother failed to object to the reduced payments for over six years.⁷⁵ Similarly, in *Shoup*, the father made a unilateral reduction with no objection by the mother for four years.⁷⁶ Mrs. Riggins prevailed on appeal, however, because the renegotiation required court approval,⁷⁷ while Mrs. Shoup lost because the unilateral reduction in support did not require court

67. *Id.* at 450, 559 S.E.2d at 677 (Koontz, J., dissenting).

68. *Id.* at 450, 559 S.E.2d at 676 (Koontz, J., dissenting).

69. *Id.* (Koontz, J., dissenting).

70. *Id.* (Koontz, J., dissenting).

71. *Id.* (Koontz, J., dissenting).

72. *Id.* at 450, 559 S.E.2d at 677 (Koontz, J., dissenting).

73. *Shoup v. Shoup*, 37 Va. App. 240, 245 n.1, 556 S.E.2d 783, 785 n.1 (Ct. App. 2001) (en banc).

74. *Riggins*, 263 Va. at 447 n.1, 559 S.E.2d at 674 n.1; *Shoup*, 37 Va. App. at 245-46, 556 S.E.2d at 786 (en banc).

75. 263 Va. at 447 n.1, 559 S.E.2d at 674 n.1.

76. *See Shoup*, 37 Va. App. at 245-46, 556 S.E.2d at 786 (en banc).

77. *Riggins*, 263 Va. at 449, 559 S.E.2d at 676.

approval.⁷⁸ Certainly, the *Riggins* court latched on to the court adjudication language,⁷⁹ while the *Shoup* court latched on to the guidelines language.⁸⁰ It remains to be seen whether these two cases will be reconciled or whether *Riggins* is considered to have overruled *Shoup*. Legislation may be introduced in the 2003 session to address this problem.

2. Deviation from Guideline Support

Other decisions of lesser interest concerning child support include *Smith v. Mann*⁸¹ and *Newland v. Newland*.⁸² Each of these unpublished decisions addresses unique issues: the maintenance of child support for a disabled child⁸³ and the requirement for payment of private school tuition.⁸⁴

In *Smith*, the parties had a child over the age of eighteen who suffered from schizophrenia and other mental disorders.⁸⁵ The mother sought a continuation of child support payments for this child after he turned age eighteen.⁸⁶ The court noted that Virginia Code section 20-124.2(C) provides for the payment of child support beyond the age of eighteen for a child who is "severely and permanently mentally or physically disabled."⁸⁷ The child's treating psychiatrist testified about the son's mental disorders,⁸⁸ yet could not opine as to whether the son's mental disability was permanent.⁸⁹ Based on the psychiatrist's explanation that the son's condition would neither abate nor improve unless new treatments became available in the future, the court of appeals found that the trial court had properly determined that the

78. *Shoup*, 37 Va. App. at 254, 556 S.E.2d at 790 (en banc).

79. 263 Va. at 448-49, 559 S.E.2d at 676.

80. 37 Va. App. at 254, 556 S.E.2d at 790 (en banc).

81. No. 0206-01-2, 2001 Va. App. LEXIS 703 (Ct. App. Dec. 18, 2001) (unpublished decision).

82. No. 0907-01-4, 2002 Va. App. LEXIS 152 (Ct. App. Mar. 12, 2002) (unpublished decision).

83. *Smith*, 2001 Va. App. LEXIS 703, at *3.

84. *Newland*, 2002 Va. App. LEXIS 152, at *2-3.

85. *Smith*, 2001 Va. App. LEXIS 703, at *3.

86. *See id.* at *1-2.

87. *Id.* at *3; *see also* VA. CODE ANN. § 20-124.2(C) (Repl. Vol. 2000 & Cum. Supp. 2002).

88. *Smith*, 2001 Va. App. LEXIS 703, at *3-5.

89. *Id.* at *5.

child's mental disability was permanent in nature.⁹⁰ Therefore, the trial court was correct in ordering the father to continue to pay child support payments.⁹¹

In *Newland*, the court of appeals reversed the trial court for modifying child support to include the costs of private school tuition for the children.⁹² The trial court had added the cost of private school tuition as a childcare expense to the child support guideline presumptive amount.⁹³ The court of appeals held it was error to include the children's private school tuition as a childcare expense.⁹⁴ The trial court must first determine the presumptive guideline amount figure, which it had failed to do.⁹⁵ If, thereafter, the presumptive guideline figure is unjust or inappropriate, the trial court could make written findings to that effect and deviate from the presumptive child support amount.⁹⁶

In conclusion, the most important cases regarding support are the *Riggins* and *Shoup* decisions regarding self-executing provisions for child support modification. These cases leave some room for doubt as to the efficacy of such provisions. To be truly self-executing, the statutory guidelines should be referenced and utilized by the terms of the parties' agreement. However, court approval of such modifications may still be required.

B. Legislative Changes

1. Gross Income for Self-Employment Tax

The most significant bill passed by the General Assembly in the area of child support amended the definition of "gross income."⁹⁷ Before this amendment, only wage earners qualified to

90. *Id.* at *6-7.

91. *Id.* at *7. It should be noted that the onset of such disabilities must commence while the child is still eligible for support in order for the support to continue after the child's emancipation. See generally VA. CODE ANN. § 20-124.2(C) (Repl. Vol. 2000 & Cum. Supp. 2002) (stating that a court may order continuation of support for any child with a severe disability).

92. *Newland v. Newland*, No. 0907-01-04, 2002 Va. App. LEXIS 152, at *1 (Ct. App. Mar. 12, 2002) (unpublished decision).

93. *Id.* at *5.

94. *Id.* at *7.

95. *Id.* at *7-8.

96. *Id.* at *8.

97. See H.B. 1034, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 8,

have the self-employment tax deducted from their gross income.⁹⁸ The General Assembly, in an effort to give equality to self-employed individuals, changed the definition of "gross income" to allow self-employed individuals to deduct an amount equal to one-half of any self-employment tax.⁹⁹ After October 1, 2002, both self-employed individuals and wage earners will be treated equally when it comes to the definition of gross income and the impact of the self-employment tax.¹⁰⁰

2. Healthcare Coverage

The General Assembly passed a somewhat technical and complicated bill dealing with healthcare coverage for children in child support proceedings.¹⁰¹ First, Senate Bill 470 amends Virginia Code section 63.1-250.¹⁰² Section 63.1-250 now provides that a "reasonable cost" for health insurance shall be an amount "that does not exceed five percent of a parent's gross income."¹⁰³ If the healthcare coverage is unavailable at a reasonable cost, the Department of Social Services must refer the dependent children to the Family Access to Medical Insurance Security Plan.¹⁰⁴ Further, the statute requires the department to "use the National Medical Support Notice (NMSN) to enforce the provision of healthcare coverage through an employment-related group health plan pursuant to a child support order if available at a reasonable cost," unless an order stipulates to an alternative healthcare coverage.¹⁰⁵ Finally, the notice of child support must include a statement that healthcare coverage shall be required if available at a reasonable cost.¹⁰⁶ This amendment demonstrates the intent of the General Assembly to secure healthcare coverage for as many children as possible.

2002, ch. 650, 2002 Va. Acts 587) (codified at VA. CODE ANN. § 20-108.2 (Cum. Supp. 2002)).

98. Compare VA. CODE ANN. § 20-108.2(C) (Cum. Supp. 2001), with *id.* § 20-108.2(C) (Cum. Supp. 2002).

99. *Id.* § 20-108.2(C) (Cum. Supp. 2002)

100. *Id.*

101. See S.B. 470, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 17, 2002, ch. 844, 2002 Va. Acts 584) (codified at VA. CODE ANN. §§ 63.1-250, -250.1, -250.2, -250.3:1, -252.1 (Repl. Vol. 2002)).

102. See *id.*

103. VA. CODE ANN. § 63.1-250 (Cum. Supp. 2002).

104. *Id.* § 63.1-250.1(A) (Cum. Supp. 2002).

105. *Id.* § 63.1-250.3(A) (Cum. Supp. 2002).

106. *Id.* § 63.1-250.1 (Cum. Supp. 2002).

III. CHILD CUSTODY

A. Case Law

1. Presumptions of Law

Practitioners have been unable to predict the outcome of cases where a custodial parent requests the relocation of the children. Last year, the family law article of the *Annual Survey* discussed the case of *Cloutier v. Queen*,¹⁰⁷ where the Virginia Court of Appeals affirmed the trial court's decision that it would not be in the children's best interest to relocate with their mother, upon her remarriage, to Pennsylvania—four hours away from their father in Virginia.¹⁰⁸ This year, in *Goodhand v. Kildoo*,¹⁰⁹ the court of appeals affirmed the decision of the trial court permitting the mother, upon her remarriage, to relocate to Arizona with the parties' minor child while the children's father remained in Fairfax County.¹¹⁰ The parents shared joint custody of their youngest child, who was ten years old, pursuant to the custody agreement.¹¹¹ The mother had primary physical custody during the school year and the father had primary physical custody during the summer, as well as visitation during the school year.¹¹² The mother married a man from Arizona who relocated to Virginia for three months, but then returned to his job in Arizona.¹¹³

The trial court made specific findings for each of the enumerated factors found at Virginia Code section 20-124.3.¹¹⁴ In weighing the factors in the best interests of the child, the trial court found that the mother thought that shared custody was "horrible"; additionally, the court found that the mother had been the

107. See 35 Va. App. 413, 545 S.E.2d 574 (Ct. App. 2001); Elizabeth P. Coughter & Ronald R. Tweel, *Annual Survey of Virginia Law: Family Law*, 35 U. RICH. L. REV. 651, 670 (2001).

108. 35 Va. App. at 429-30, 545 S.E.2d at 582.

109. 37 Va. App. 591, 560 S.E.2d 463 (Ct. App. 2002).

110. *Id.* at 595, 560 S.E.2d at 464.

111. *Id.*

112. *Id.*

113. *Id.* at 596, 560 S.E.2d at 465.

114. *Id.* at 597-98, 560 S.E.2d at 465-66; see also VA. CODE ANN. § 20-124.3 (Repl. Vol. 2000 & Cum. Supp. 2002) (providing a history of the factors to be examined by the court "[i]n determining best interests of a child for purposes of determining custody or visitation arrangements").

primary caregiver of the child.¹¹⁵ The trial court also found that the ability of each parent to coordinate and resolve disputes was a problem.¹¹⁶ Despite the testimony of a child psychologist that the child wished to remain in Virginia, that the child was well attached to both parents, and that both parents were actively involved in the child's life, the trial court granted the mother's petition to relocate with the child to Arizona.¹¹⁷

The Virginia Court of Appeals rejected the father's argument that when parties share custody of their child, there should be a presumption of harm when one parent proposes to move the child far away.¹¹⁸ The court of appeals confirmed that "Virginia law simply requires the court to consider and weigh the necessary factors in order to determine both whether a change in custody [would be] in the best interest of the child, and whether relocation [would be] in the best interest of the child."¹¹⁹ The law also requires that the moving party bear "the burden of proving that the relocation will not cause a 'substantial impairment' to the relationship between the non-moving parent and the child."¹²⁰ Ultimately, the court of appeals found that there was no evidence that the benefits of the father's relationship with his daughter could not be maintained while she lived in Arizona during the school year.¹²¹ In fact, the evidence "suggested that the relationship might not be affected at all."¹²²

More recently, in the unpublished decision of *Banit v. Banit*,¹²³ the trial court was affirmed on appeal in granting the mother's request to relocate with the parties' son to California.¹²⁴ The critical issue in *Banit* was whether the shared custody arrangement of alternating weekends with each parent had had a detrimental effect upon the child.¹²⁵ An independent psychologist and school psychologist each testified that the child was depressed, learning

115. *Goodhand*, 37 Va. App. at 597-98, 560 S.E.2d at 465-66.

116. *Id.* at 598, 560 S.E.2d at 466.

117. *Id.* at 596, 602, 560 S.E.2d at 465, 468.

118. *Id.* at 601, 560 S.E.2d at 467.

119. *Id.* at 602, 560 S.E.2d at 468.

120. *Id.*

121. *Id.* at 602-03, 560 S.E.2d at 468.

122. *Id.* at 603, 560 S.E.2d at 468.

123. No. 3237-01-4, 2002 Va. App. LEXIS 263 (Ct. App. Apr. 30, 2002) (unpublished decision).

124. *Id.* at *2.

125. *Id.* at *4.

disabled, emotionally disturbed, and suffered anxiety as a result of the shared custody schedule.¹²⁶ The evidence also established that the strong bond between the father and son would not be harmed by the move to California since the child would be with his father for the summer and other vacations.¹²⁷

The precedent presented by these cases remains unclear: the stated facts in *Goodhand*, where the mother was permitted to relocate,¹²⁸ do not appear to be nearly as persuasive as the facts in *Cloutier*, where the mother was not allowed to relocate.¹²⁹ The lesson from these cases is that trial courts are afforded great discretion in relocation cases and are rarely overturned on appeal.

In another custody case decided by the Virginia Court of Appeals, *Carter v. Carter*,¹³⁰ the court refused to adopt a presumption in favor of a biological parent over an adoptive parent.¹³¹ In this case, the Carters divorced after the stepfather had adopted the mother's biological five-year-old son whom he had helped raise since birth.¹³² When the parties separated, a child custody order awarded custody of both children to the father.¹³³ This order was subsequently upheld by the circuit court.¹³⁴ On appeal, the court refused to adopt the mother's argument that the law should recognize a presumption of custody in her favor since she was the biological parent.¹³⁵ The court of appeals noted that Virginia Code section 63.1-219.22 provides that an adoptive child is the child of the person who adopted him or her and has the same rights and privileges as a biological child of the adoptive parent.¹³⁶

126. *Id.* at *2-3.

127. *Id.* at *6.

128. 37 Va. App. 591, 595, 560 S.E.2d 463, 464 (Ct. App. 2002).

129. 35 Va. App. 413, 429-30, 545 S.E.2d 574, 582 (Ct. App. 2001).

130. 35 Va. App. 466, 546 S.E.2d 220 (Ct. App. 2001).

131. *Id.* at 468, 546 S.E.2d at 221.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 469, 546 S.E.2d at 221.

136. *Id.* at 468, 546 S.E.2d at 221; see also VA. CODE ANN. § 63.1-219.22 (Cum. Supp. 2002).

2. Joint Custody

Finally, in *Tignor v. Tignor*,¹³⁷ the Virginia Court of Appeals affirmed an award of custody in which the parents shared joint physical custody and the children shifted between the parents' residences on a weekly basis.¹³⁸ The mother objected to this equal sharing of physical custody.¹³⁹ The court of appeals found that the trial court properly accepted the testimony of the father's expert witness who endorsed such a custody arrangement.¹⁴⁰ This case is significant, as it is contrary to the experience of the authors of this article for a court to award shared physical custody over the objection of a parent when there is an inability of the parents to communicate harmoniously regarding their children.¹⁴¹

Tignor differs considerably in its conclusions¹⁴² from those found in *Banit*.¹⁴³ The *Tignor* court imposed a shared physical custody arrangement on the parents,¹⁴⁴ while the *Banit* court set aside such an arrangement.¹⁴⁵ In *Tignor*, however, it remained to be seen what effect the shared custody arrangement would have on the children,¹⁴⁶ while in *Banit*, the mother established to the court's satisfaction the harmful effect the arrangement had on her son.¹⁴⁷

In conclusion, the case law regarding child custody issues seems to indicate a lack of enthusiasm by the court of appeals to adopt any presumptions as a matter of law in relocation cases or otherwise. Moreover, the discretion of the trial court in these cases is not likely to be set aside.

137. No. 2995-00-1, 2001 Va. App. LEXIS 384 (Ct. App. June 26, 2001) (unpublished decision).

138. *Id.* at *1.

139. *Id.* at *8.

140. *Id.* at *13.

141. *Id.* at *4. The commissioner, whose recommendations were adopted by the trial court, had concluded in *Tignor* that the parents were not able to communicate effectively with each other. *Id.*

142. *Id.* at *1-2.

143. *Banit v. Banit*, No. 3237-01-4, 2002 Va. App. LEXIS 263, at *2 (Ct. App. Apr. 30, 2002) (unpublished decision).

144. *Tignor*, 2001 Va. App. LEXIS 384, at *1-2.

145. *Banit*, 2002 Va. App. LEXIS 263, at *5.

146. *See Tignor*, 2001 Va. App. LEXIS 384, at *11-12.

147. *Banit*, 2002 Va. App. LEXIS 263, at *2-3.

B. *Legislative Changes*

1. Admissibility of Mental Health Records

During the 2002 session, the General Assembly passed important legislation in the area of mental health records. The most significant bill to pass related to the admissibility of therapy records of parties to a custody or visitation proceeding.¹⁴⁸ Various bar groups and the Virginia Psychological Association ("VPA") have been discussing addressing this area of the law for a number of years. The VPA wanted to promote its therapy by restricting access to its medical records and by prohibiting mental health professionals from testifying in custody and visitation cases.¹⁴⁹ On the opposite side, lawyers and judges have traditionally sought the discovery and introduction of this evidence because of the mandated statutory criteria found in Virginia Code sections 20-107.1, 20-107.3, and 20-124.3. These statutes require courts to consider the mental health of the parties in custody and visitation hearings.¹⁵⁰ Therefore, lawyers and judges have been accustomed to breaching this area of confidentiality because the patient has placed his or her mental condition at issue.¹⁵¹ Even though bills concerning this issue failed to pass in previous sessions, this year the Association outmaneuvered the state bar with the passage of House Bill 1001.¹⁵² Nevertheless, a strong lobbying effort by certain bar groups persuaded Governor Mark Warner to delay the implementation of this new statute until July 1, 2003.¹⁵³ One can expect a vigorous fight in the 2003 session for a repeal of this statute.

Specifically, the bill provides that in any case in which custody or visitation is an issue in the circuit or district court, "the records concerning a parent, kept by any licensed mental health-

148. H.B. 1001, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 17, 2002, ch. 881, 2002 Va. Acts 733) (codified at VA. CODE ANN. § 20-124.3:1 (Cum. Supp. 2002)).

149. For more information on the VPA, see their Web site at <http://www.vapsych.org> (last modified Sept. 11, 2002).

150. VA. CODE ANN. § 20-107.1(E)(4) (Repl. Vol. 2000 & Cum. Supp. 2002); *Id.* § 20-107.3(E)(4) (Repl. Vol. 2000 & Cum. Supp. 2002); *Id.* § 20-124.3(2) (Repl. Vol. 2000 & Cum. Supp. 2002).

151. *Id.* § 8.01-399 (Repl. Vol. 2000).

152. H.B. 1001, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 17, 2002, ch. 881, 2002 Va. Acts 733) (codified at VA. CODE ANN. § 20-124.3:1 (Cum. Supp. 2002)).

153. *Id.*

care provider and any information obtained during or from therapy shall be privileged and confidential.”¹⁵⁴ Further, the mental healthcare provider shall not be required to testify on behalf of the parent or any of the parent’s adult relatives without the written consent of the parent.¹⁵⁵ This restriction would also apply to depositions.¹⁵⁶ Next, if the mental health provider does testify, the testimony is limited to the custody and visitation case in question and the healthcare provider’s records and notes are not admissible in the court proceeding.¹⁵⁷ Accordingly, a healthcare provider can testify only if the patient has requested or permitted him or her to do so.

Fortunately, the General Assembly permitted exceptions to this restriction.¹⁵⁸ The first is in cases of abuse or neglect as defined by Virginia Code section 63.2-1509.¹⁵⁹ The second exception applies to situations where the healthcare providers are conducting an independent mental health evaluation pursuant to a court order.¹⁶⁰

If this law is not repealed next year, it remains to be seen how courts will receive the testimony and documents necessary to assess the mental health of the parties as required by the statutes mentioned above. Once a clearer explanation of this statutory criteria is provided to the General Assembly, the legislative body may well take a different view in 2003.

2. Jurisdiction to Order Psychological Tests

There has been considerable debate among lawyers and judges over the past few years about the authority or jurisdiction of the juvenile and circuit courts to order psychological or custody evaluations. Various articles have been written about the issue, some of which are conflicting.¹⁶¹ The General Assembly has now

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*; see also VA. CODE ANN. § 63.2-1509 (Cum. Supp. 2002). Title 63.1 of the Virginia Code was repealed effective October 1, 2002 and reenacted as Title 63.2.

160. Va. H.B. 1001.

161. See, e.g., Timothy B. Beason & J.M. Carlberg, *The Legal Basis for Appointing Independent Psychological Evaluators in Custody Court*, FAM. L. NEWS, Spring 2001.

provided clarity for such orders in juvenile court.¹⁶² By a new statute passed this year, the juvenile and domestic relations courts now have clear authority to order such psychological evaluations of "any parent, guardian, legal custodian or person standing in loco parentis to the child."¹⁶³ The courts also have discretion to apportion the cost of these evaluations.¹⁶⁴ In addition, the bill provides that the juvenile courts have the authority to order drug testing on such parties as it deems appropriate.¹⁶⁵

The obvious unanswered question is why is this authority only given to the juvenile courts and not to the circuit courts? It is our belief that this question will be answered next year when corresponding legislation will be introduced granting circuit courts this same authority. There certainly is no rationale or logic for only the juvenile courts to have this power.

3. Termination of Parental Rights

In the past there has been a considerable amount of case law and debate about what efforts need to be made by the Department of Social Services before it is appropriate for a court to terminate parental rights.¹⁶⁶ In an effort to lighten the burden on the Department of Social Services so that it would be easier to terminate parental rights and place a child for adoption, the General Assembly amended two statutes.¹⁶⁷ The newly amended statutes enunciate additional circumstances where no effort to reunite the child with the biological parent is required.¹⁶⁸ A reunion is not necessary when a parent has subjected a child to "aggravated circumstances" or has abandoned the child under cir-

162. VA. CODE ANN. § 16.1-278.15(G)-(H) (Cum. Supp. 2002).

163. *Id.* § 16.1-278.15(G).

164. *Id.*

165. *Id.* § 16.1-278.15(H).

166. *See, e.g., Jenkins v. Richmond Dep't of Soc. Serv.*, No. 1224-01-2, 2002 Va. App. LEXIS 41 (Ct. App. Jan. 29, 2002) (unpublished decision) (reversing trial court's termination of parental rights after evidence failed to show that the Department of Social Services offered any services to father); *Marlowe v. Chesterfield/Colonial Heights Dep't of Soc. Serv.*, No. 1913-99-2, 2000 Va. App. LEXIS 104 (Ct. App. Feb. 15, 2000) (unpublished decision) (finding that Department of Social Services satisfied the requirement of reasonable efforts by providing group therapy and classes on independent living and childcare); *Fields v. Hopewell Dep't of Soc. Serv.*, No. 1936-99-2, 2000 Va. App. LEXIS 58 (Ct. App. Feb. 8, 2000) (unpublished decision) (terminating parental rights and holding that Department of Social Services did not fail to make efforts because whereabouts of parent unknown).

167. VA. CODE ANN. §§ 16.1-281(B), -283(E) (Cum. Supp. 2002).

168. *Id.*

cumstances that would justify termination of the parental rights.¹⁶⁹ "Aggravated circumstances" include such actions as "torture, chronic or severe abuse, or chronic or severe sexual abuse."¹⁷⁰

4. Violation of Visitation Orders

Many non-custodial parents have lobbied the General Assembly for years to make interference with visitation a crime while other non-custodial parents have lobbied to make the penalty stiffer for such interferences. These simultaneous efforts have been successful because this year the General Assembly amended Virginia Code section 18.2-49.1(B) to increase the penalties for willful violations of orders regarding custody and visitation.¹⁷¹ This amendment changes the penalty for a first offense from a Class IV misdemeanor to a Class III misdemeanor, which means that a person is now subject to incarceration.¹⁷² Further, a third offense within twenty-four months of the first conviction shall be a Class I misdemeanor, which means that a person could receive up to one year in jail and/or a \$2,500 fine.¹⁷³ Only time will tell whether the threat of incarceration for a first offense will usher in a new series of criminal proceedings in the Commonwealth.

IV. SPOUSAL SUPPORT

A. Case Law

1. Cohabitation

As reported in last year's article,¹⁷⁴ family law practitioners eagerly awaited the rehearing decision in *Rubio v. Rubio*.¹⁷⁵ The en banc decision in *Rubio v. Rubio*¹⁷⁶ vacated the panel decision and

169. *Id.* § 16.1-281(B) (Cum. Supp. 2002).

170. *Id.*

171. *Id.* § 18.2-49.1 (Cum. Supp. 2002).

172. *Id.*

173. *Id.*

174. Coughter & Tweel, *supra* note 107, at 687-88.

175. 33 Va. App. 74, 531 S.E.2d 612 (Ct. App. 2000) [hereinafter *Rubio I*].

176. 36 Va. App. 248, 549 S.E.2d 610 (Ct. App. 2001) (en banc) [hereinafter *Rubio II*].

reversed the judgment of the trial court remanding it for further proceedings.¹⁷⁷ *Rubio I* caused great consternation among the legal community because it found that Virginia Code section 20-109(A) as amended re-established the Act, which would limit the scope of the statute to "suits filed on or after July 1, 1998, seeking initial support orders."¹⁷⁸ Thereafter, the Virginia General Assembly modified section 20-109(A).¹⁷⁹ *Rubio II* acknowledged that section 20-109(A), which terminates spousal support upon the payee's cohabitation with another person in a relationship analogous to marriage for a year or more,¹⁸⁰ did not apply when the parties' stipulation agreement was not merged into the divorce decree.¹⁸¹

The Virginia Court of Appeals found that there is a distinction among property settlement agreements which were: (1) merely affirmed; (2) incorporated; or (3) incorporated without merger in the subsequent divorce decree.¹⁸² The court reasoned that an "affirmed" agreement is enforceable only as a contract; an "incorporated" agreement is merged and enforceable only as a decree, and an "incorporated but not merged" agreement is enforceable as either a contract or a decree.¹⁸³

In *Rubio II*, the parties' stipulation agreement provided that it would not be merged into the divorce decree.¹⁸⁴ The divorce decree did not order merger.¹⁸⁵ Without merger, the agreement remained enforceable as a contract and unaffected by the subsequent cohabitation amendment to Virginia Code section 20-109(A).¹⁸⁶ The parties' agreement could not be modified by the court as Virginia Code section 20-109(C) prohibits such modification.¹⁸⁷ Hopefully, the *Rubio* fiasco is over at last.

177. *Id.* at 250, 549 S.E.2d at 611 (en banc).

178. *Rubio I*, 33 Va. App. at 76-77, 531 S.E.2d at 613.

179. VA. CODE ANN. § 20-109(A) (Cum. Supp. 2002).

180. *Id.*

181. 36 Va. App. at 255, 549 S.E.2d at 613 (en banc).

182. *Id.* at 254, 549 S.E.2d at 613 (en banc).

183. *Id.* (citing *Hering v. Hering*, 33 Va. App. 368, 373, 533 S.E.2d 631, 633-34 (Ct. App. 2000)).

184. *Id.* at 255, 549 S.E.2d at 613 (en banc).

185. *Id.* (en banc).

186. *Id.* (en banc).

187. *Id.* (en banc).

In *Tanger v. Tanger*,¹⁸⁸ a finding of cohabitation was established and spousal support was terminated.¹⁸⁹ In that case, the wife was living in an apartment in her employer's residence.¹⁹⁰ She and her employer, however, testified that they did not have a sexual relationship and did not sleep in the same bed.¹⁹¹ The evidence established that the wife lived in her employer's residence for four or five years and that the parties' adult child also lived there for two or three years.¹⁹² The wife paid neither rent nor utility bills.¹⁹³ The wife did, however, use her employer's credit card to pay for her food, dental care, and gasoline when driving her employer's car.¹⁹⁴ She also paid for her athletic club membership and her dog's veterinary bills with this same credit card.¹⁹⁵ She and her employer traveled to Europe several times.¹⁹⁶ The wife, however, did not perform certain other marital duties—she did not cook or clean for her employer, nor did she do his laundry.¹⁹⁷ She said that she paid for her own food.¹⁹⁸ Finally, she claimed that she reimbursed her employer for her credit card purchases with cash but had no records to establish those cash reimbursements.¹⁹⁹ The trial court found that the lack of a sexual relationship was “nearly irrelevant” on the issue of cohabitation under these facts.²⁰⁰

2. Imputation of Income

This year the Virginia Court of Appeals also revisited *Joynes v. Payne*.²⁰¹ In *Joynes I*, the court of appeals remanded the decision to the trial court for a determination of child support based on the

188. No. 2017-00-3, 2001 Va. App. LEXIS 472 (Ct. App. Aug. 7, 2001) (unpublished decision).

189. *Id.* at *15–16.

190. *Id.* at *3.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at *4.

195. *Id.*

196. *Id.* at *4–5.

197. *Id.* at *5.

198. *Id.*

199. *Id.* at *4.

200. *Id.* at *6.

201. 35 Va. App. 386, 545 S.E.2d 561 (Ct. App. 2001) [hereinafter *Joynes I*].

wife's imputed income.²⁰² In the second appeal, *Joynes v. Payne*,²⁰³ the court of appeals stayed its *Joynes I* decision and affirmed the trial court's decision in its entirety.²⁰⁴ The court of appeals agreed that the commissioner had properly considered, for purposes of spousal and child support, the wife's actual part-time earnings when determining her ability to earn an income and for purposes of imputing income to her.²⁰⁵ The court found that an alleged agreement by the parties that the wife would work part-time while raising the children was relevant.²⁰⁶ It was also appropriate for the commissioner to consider the wife's subsequent termination of her part-time employment as a negative non-monetary contribution and as a factor leading to the dissolution of the marriage.²⁰⁷ Therefore, the court of appeals held that the trial court properly considered the wife's actual part-time earnings for determination of support even though she had terminated that job.²⁰⁸ Moreover, the job termination was considered a negative factor in equitable distribution.²⁰⁹

The Virginia Court of Appeals also addressed the issues of voluntary underemployment and imputed income in *Peverell v. Eskew*.²¹⁰ The father in this case sought to impute income to the wife for purposes of modifying child support when one of the parties' two children was placed in his primary physical custody.²¹¹ The mother had remarried and the children's father contended that many of her daily ordinary living expenses were paid for by her current husband.²¹² The court of appeals found that the trial court had failed to make any factual finding as to why the payments made on the mother's behalf by her current husband were excluded from calculating her gross monthly income.²¹³ The court

202. *Id.* at 412, 545 S.E.2d at 574.

203. 36 Va. App. 401, 551 S.E.2d 10 (Ct. App. 2001) [hereinafter *Joynes II*].

204. *Id.* at 411, 551 S.E.2d at 15.

205. *Id.* at 422, 551 S.E.2d at 20.

206. *Id.* at 425-26, 551 S.E.2d at 22.

207. *Id.* at 430, 551 S.E.2d at 24.

208. *Id.* at 422, 551 S.E.2d at 20.

209. *Id.* at 430, 551 S.E.2d at 24.

210. No. 0060-01-4, 2002 Va. App. LEXIS 242 (Ct. App. Apr. 23, 2002) (unpublished decision).

211. *Id.* at *4.

212. *Id.*

213. *Id.* at *9-10.

remanded this particular issue for additional findings of fact by the trial court.²¹⁴

The father also argued that the mother was voluntarily underemployed.²¹⁵ The trial court established that the mother was previously employed in a full time position from which she voluntarily resigned.²¹⁶ The mother then had the burden of proving that her underemployment was not "voluntary."²¹⁷ The court of appeals found credible evidence to affirm the trial court's finding that her underemployment was not voluntary based on the evidence that she had "cogent reasons" for being employed part-time.²¹⁸ Those reasons included the mother's care of her son who was recovering from an automobile accident, the care of her daughter who was in counseling, and having to deal with "multiple investigations by child protective services" upon the father's complaint and allegations of sexual abuse by the stepfather.²¹⁹ The mother was also recovering from her own personal medical problems.²²⁰ Upon these facts, the court of appeals held that the "evidence did not warrant an imputation of income to the mother."²²¹

In *Carr v. Carr*,²²² the Virginia Court of Appeals considered whether a wife was voluntarily unemployed by working in a part-time, as opposed to a full-time, position.²²³ The parties were married for twenty years before they separated, and the wife had not worked outside the home for fifteen years prior to their separation.²²⁴ The evidence revealed "that the parties' youngest child [a teenager], was having significant behavioral and emotional issues caused by the divorce."²²⁵ For that reason, the court of appeals affirmed the commissioner's and trial court's finding that it was appropriate for the wife not to work full-time under those circum-

214. *Id.* at *10.

215. *Id.*

216. *Id.* at *11.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at *12.

222. No. 1848-01-4, 2002 Va. App. LEXIS 279 (Ct. App. May 7, 2002) (unpublished decision).

223. *Id.* at *8.

224. *Id.* at *9.

225. *Id.*

stances.²²⁶ The husband also failed to present any evidence of the availability of full-time jobs for his wife.²²⁷

In conclusion, under *Carr* and *Peeverell*, the party seeking to impute income carries the burden of proof.²²⁸ *Carr* further notes that this burden includes proving that jobs suitable for the underemployed party are actually available in the community.²²⁹ Additionally, *Joyes II* and *Carr* affirm that a trial court's failure to limit spousal support to a specific period of time would not be considered an abuse of discretion.²³⁰ Under current Virginia law, a lengthy marriage and an underemployed spouse with needy children provide sufficient evidence to sustain an award of permanent spousal support.

3. Arrearages

In *Bazzle v. Bazzle*,²³¹ the Virginia Court of Appeals decided an interesting case on the issue of spousal support arrearages. In 1982, the husband stopped paying spousal support to his former wife pursuant to the parties' Property Settlement Agreement ("PSA") which had been incorporated into the parties' 1974 final divorce decree.²³² The wife filed a motion for judgment at law against the husband seeking an award in excess of \$429,000.²³³ She calculated this amount as the present value of the husband's remaining spousal support obligation due over the balance of her life expectancy. She obtained a default judgment in the amount of \$429,565.²³⁴

In 1984, the husband moved to vacate the default judgment but was denied his requested relief.²³⁵ The trial court, however,

226. *Id.* at *10.

227. *Id.*

228. *Id.* at *9; *Peeverell v. Eskew*, No. 0060-01-4, 2002 Va. App. LEXIS 242, at *10 (Ct. App. Apr. 23, 2002) (unpublished decision).

229. 2002 Va. App. LEXIS 279, at *9.

230. *Joyes II*, 36 Va. App. 401, 423, 551 S.E.2d 10, 21 (Ct. App. 2001); *Carr*, 2002 Va. App. LEXIS 279, at *13.

231. 37 Va. App. 737, 561 S.E.2d 50 (Ct. App. 2002).

232. *Id.* at 741, 561 S.E.2d at 52.

233. *Id.*

234. *Id.* The default judgment provided that if the wife collected the full amount, it was to be placed in a trust and distributed in monthly installments over thirty-seven years. If the wife died or remarried any remainder would be repaid to the husband. *Id.* at 741 n.2, 561 S.E.2d at 52 n.2.

235. *Id.* at 741-42, 561 S.E.2d at 52.

enjoined the wife from collecting the default judgment so long as the husband continued to make his monthly payments and "maintained a \$50,000 letter of credit to her benefit."²³⁶ The husband continued to make the monthly spousal support payments from 1984 through 1999 and paid off the entire judgment.²³⁷ The husband paid in excess of \$429,565 to his former wife.²³⁸

In June of 1999, the wife filed a motion to show cause when her husband, once again, stopped paying the monthly spousal support.²³⁹ The court of appeals affirmed the trial court's finding that the wife had chosen her remedy by electing to sue for the anticipatory breach of the parties' PSA in seeking a total amount of support due under their contract.²⁴⁰ However, that amount had been reduced to a judgment and was paid in full and marked satisfied.²⁴¹ Thus, she could not thereafter "double-dip" and seek a continuation of spousal support, especially since neither the PSA nor the divorce decree which incorporated the agreement provided for modification of spousal support.²⁴²

Bazzle is instructive because it acknowledges an alternative procedure for collecting support arrearages when spousal support is a set sum and not modifiable. Of course, the unusual circumstance in this case is that the husband had a default judgment entered against him. The wife's judgment for prospective spousal support was insufficient to cover her lifetime need. Therefore, had she continued to collect support instead of reducing the arrearages and future support to a judgment, she may have fared better financially. Also, the *Bazzle* decision does not address the issue of whether or not a lump sum award for prospective spousal support is appropriate.

236. *Id.* at 742, 561 S.E.2d at 52-53.

237. *Id.* at 742, 561 S.E.2d at 53.

238. *Id.* In April 1999, the husband's attorney notified the wife that the judgment had been overpaid and requested its release and satisfaction, which was done. *Id.* at 742-43, 561 S.E.2d at 53.

239. *Id.* at 743, 561 S.E.2d at 53.

240. *Id.* at 747, 561 S.E.2d at 55.

241. *Id.* at 742-43, 561 S.E.2d at 53.

242. *Id.* at 744, 561 S.E.2d at 53.

4. Miscellaneous Issues

Another issue addressed in recent decisions was the necessary proof of voluntary underemployment when establishing spousal support.²⁴³ In *Grover v. Grover*,²⁴⁴ the husband had been ordered to pay spousal support in a divorce action in which his wife was awarded a fault-based divorce on the grounds of adultery.²⁴⁵ Three years after the divorce decree, the husband petitioned the trial court “to reinstate the case and reduce his spousal support” obligation.²⁴⁶ The husband sought to establish that the wife was voluntarily underemployed and that her circumstances had materially changed.²⁴⁷ The trial court found, however, that the husband failed to present evidence that there was a job available in the area where the wife lived and in her field of employment experience.²⁴⁸ The evidence indicated that the wife had last worked as a medical technician over twenty years ago.²⁴⁹ The husband presented evidence relating to employment opportunities in other geographic areas based solely on advertisements and Internet research.²⁵⁰ The Virginia Court of Appeals affirmed the trial court’s finding that the husband failed to prove by a preponderance of the evidence that the wife was voluntarily underemployed and could currently obtain employment as a medical technician within a reasonable distance from her home.²⁵¹

The decision of *Mabie v. Mabie*²⁵² confirmed that the reservation of rights for spousal support provision found in Virginia Code section 20-107.1(D) is mandatory.²⁵³ In this case, the parties were married for over twenty-five years, and the wife requested permanent spousal support in the divorce action.²⁵⁴ The trial court,

243. See, e.g., *Grover v. Grover*, No. 1544-01-3, 2001 Va. App. LEXIS 613 (Ct. App. Nov. 6, 2001) (unpublished decision).

244. *Id.*

245. *Id.* at *2.

246. *Id.*

247. *Id.* at *3.

248. *Id.* at *5. The wife resided in Bedford, Virginia. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at *5-6.

252. No. 0729-01-4, 2002 Va. App. LEXIS 164 (Ct. App. Mar. 19, 2002) (unpublished decision).

253. *Id.* at *4-5; see also VA. CODE ANN. § 20-107.1(D) (Repl. Vol. 2000 & Cum. Supp. 2002).

254. *Mabie*, 2002 Va. App. LEXIS 164, at *2.

however, awarded her spousal support for a period of only six years.²⁵⁵ The wife also requested the reservation of right to an award of spousal support.²⁵⁶ The Virginia Court of Appeals found no abuse of discretion by the trial court in the award of limited duration spousal support.²⁵⁷ It did find error, however, on the reservation of rights for spousal support, and the court reversed and remanded the matter.²⁵⁸ The court found that there was no evidence in the record to rebut the presumption that a reservation of right for spousal support should run for the period specified in the statute, i.e., "fifty percent of the length of time between the date of the marriage and the date of separation."²⁵⁹ The parties had been married twenty-eight years and, thus, the reservation should have been for at least fourteen years.²⁶⁰ The court of appeals held that the trial court's reservation of right for support for a six-year period concurrent with the award of spousal support was in error.²⁶¹

In conclusion, the cases regarding spousal support have put to rest the issue of the retroactive application of the statutory termination of spousal support upon proof of cohabitation by the payee. If the spousal support is court ordered, or if the parties' agreement merged into a subsequent decree, termination of spousal support will occur pursuant to Virginia Code section 20-109(A).²⁶² Further, evidence of cohabitation does not have to include evidence of sexual intimacy if there is sufficient evidence of cohabitation and financial interdependence.²⁶³ Finally, the imputation of income for determination of support will focus on the actual employment circumstances of the payee in his or her place of residence.²⁶⁴

255. *Id.*

256. *Id.*

257. *Id.* at *3.

258. *Id.* at *4-5.

259. *Id.* at *4 (quoting VA. CODE ANN. § 20-107.1(D) (Repl. Vol. 2000 & Cum. Supp. 2002)).

260. *Id.*

261. *Id.* at *4-5.

262. *Rubio II*, 36 Va. App. 248, 255, 549 S.E.2d 610, 613 (Ct. App. 2001).

263. *Tanger v. Tanger*, No. 2017-00-3, 2001 Va. App. LEXIS 472, at *14 (Ct. App. Aug. 7, 2001) (unpublished decision).

264. *Carr v. Carr*, No. 1848-01-4, 2002 Va. App. LEXIS 279, at *10 (Ct. App. May 7, 2002) (unpublished decision); *Grover v. Grover*, No. 1544-01-3, 2001 Va. App. LEXIS 613, at *5-6 (Ct. App. Nov. 6, 2001) (unpublished decision).

B. *Legislative Changes*

There were no legislative changes in the spousal support area.

V. EQUITABLE DISTRIBUTION

A. *Property Settlement Agreements*

In *Flanary v. Milton*,²⁶⁵ the Supreme Court of Virginia rendered a decision on the issue of the enforceability of a parties' oral agreement.²⁶⁶ The court reviewed an oral property settlement agreement made during a deposition pending divorce.²⁶⁷ The oral agreement between the parties was recited into the record by the parties' attorneys during the wife's deposition.²⁶⁸ The agreement provided that the wife agreed to accept a lump sum payment of \$45,000, which would release her interest in her husband's assets and her interest or right to any additional future spousal support.²⁶⁹ This agreement never took effect because the husband died shortly thereafter and the divorce proceeding was consequently dismissed.²⁷⁰

After her husband's death, the wife filed a petition as the surviving spouse pursuant to Virginia Code section 64.1-151.1.²⁷¹ The executor of the husband's estate sought to estop the widow from pursuing her statutory claim.²⁷² The supreme court reasoned that since the parties' agreement was not in writing, it was not a valid agreement pursuant to the Premarital Agreement Act,²⁷³ which also applies to marital agreements.²⁷⁴ The court recognized that agreements made in contemplation of settling litigation can be

265. 263 Va. 20, 556 S.E.2d 767 (2002). For further discussion of this case see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 37 U. RICH. L. REV. 357, 377-78 (2002).

266. 263 Va. at 21, 556 S.E.2d at 768.

267. *Id.*

268. *Id.* at 21-22, 556 S.E.2d at 768.

269. *Id.* at 22, 556 S.E.2d at 768.

270. *Id.*

271. *Id.*; see also VA. CODE ANN. § 64.1-151.1 (Cum. Supp. 2002).

272. *Flanary*, 263 Va. at 22, 556 S.E.2d at 768.

273. VA. CODE ANN. §§ 20-147 to -155 (Repl. Vol. 2000 & Cum. Supp. 2002).

274. *Flanary*, 263 Va. at 24, 556 S.E.2d at 769.

enforced even though they are not written.²⁷⁵ However, Virginia Code section 20-155, regarding marital agreements, does not exempt such agreements from the requirement of being in writing.²⁷⁶ The court held that the wife's oral agreement was subject to the provisions of Virginia Code section 20-155.²⁷⁷ Since the agreement was not in writing nor signed by the parties as required by that statute, the wife had not effectively waived her surviving spouse or elective share rights to the husband's augmented estate.²⁷⁸ *Flanary*, therefore, explicitly overrules the Virginia Court of Appeals case of *Richardson v. Richardson*.²⁷⁹

Many practitioners include a provision in their standard property settlement agreement requiring that the payor of support maintain life insurance so long as the payor is responsible for paying support. In *Metcalf v. Metcalf*,²⁸⁰ the Virginia Court of Appeals reversed the trial court, which had found the husband in contempt for failing to abide by the life insurance provision requirement.²⁸¹ The trial court found the property settlement agreement to be ambiguous when it stated that the husband had to continue to maintain the wife as the primary beneficiary on his "existing" life insurance for as long as he was responsible for paying spousal support.²⁸² At the time the parties entered into the agreement, the husband had three life insurance policies.²⁸³ He later retired and one of the policies ceased.²⁸⁴ Although the trial court found the word "existing" to be ambiguous, it held the husband in contempt for failing to fulfill the obligation to maintain at least \$100,000 worth of life insurance.²⁸⁵

On appeal, the court of appeals found that, assuming the agreement was ambiguous, it was error to hold the husband in

275. *Id.* at 23, 556 S.E.2d at 769.

276. *Id.*; see also VA. CODE ANN. § 20-155 (Repl. Vol. 2000 & Cum. Supp. 2002).

277. *Flanary*, 263 Va. at 24, 556 S.E.2d at 769; see also VA. CODE ANN. § 20-155 (Repl. Vol. 2000 & Cum. Supp. 2002).

278. *Flanary*, 263 Va. at 24, 556 S.E.2d at 769; see also VA. CODE ANN. § 20-155 (Repl. Vol. 2000 & Cum. Supp. 2002).

279. *Flanary*, 263 at 23, 556 S.E.2d at 769; see also *Richardson v. Richardson*, 10 Va. App. 391, 392 S.E.2d 688 (Ct. App. 1990).

280. No. 1208-01-4, 2002 Va. App. LEXIS 208 (Ct. App. Apr. 2, 2002) (unpublished decision).

281. *Id.* at *3-4.

282. *Id.*

283. *Id.* at *2.

284. *Id.*

285. *Id.* at *4.

contempt.²⁸⁶ It was not clear from the language of the agreement that the husband was required to maintain a minimum level of \$100,000 worth of life insurance.²⁸⁷ Therefore, he did not violate a clearly defined and imposed duty and his actions could not constitute contempt.²⁸⁸ The contempt finding and an award of attorney's fees in favor of the wife was thus reversed.²⁸⁹

B. *Property Characterization*

In another equitable distribution decision, *Roberts v. Roberts*,²⁹⁰ the Virginia Court of Appeals found that real estate which originally had been titled in the wife's parents' names, but was encumbered by a debt in the joint names of the parties, had not been transmuted into marital property.²⁹¹ The lien on the property was in the name of the husband and wife but had been paid by the wife's parents who resided on the property.²⁹² The court of appeals found that the cosigning of the loan on the real estate by the parties and the purchase of a replacement dishwasher for the parents' use did not amount to "personal efforts" that were significant, nor did they result in substantial appreciation of the property.²⁹³

The court of appeals noted that the trial court and commissioner failed to identify the correct net equity on certain real estate and to value all the marital property.²⁹⁴ Moreover, the lower court and commissioner did not identify the evidence that supported the equitable distribution award.²⁹⁵ The court of appeals found clear error, and stated, "while the court is not expected to do a law review article on the rationale for the equitable distribution award, it needs to give some identifiable written ration-

286. *Id.* at *5.

287. *Id.*

288. *Id.* at *6 (citing *Winn v. Winn*, 218 Va. 8, 10–11, 235 S.E.2d 307, 309 (1977)).

289. *Id.* The case was remanded to ensure that any counsel fees paid by the husband under the trial court's order were returned to him. *Id.*

290. No. 0095-01-3, 2001 Va. App. LEXIS 588 (Ct. App. Oct. 23, 2001) (unpublished decision).

291. *Id.* at *10–13.

292. *Id.* at *11–12.

293. *Id.* at *12.

294. *Id.* at *13–14.

295. *Id.* at *20–21.

ale.”²⁹⁶ The court continued to criticize the lower court, stating that, “the failure to classify and value all the assets does not allow for verification that the court’s intended division was properly done.”²⁹⁷ Therefore, it remains clear that in rendering an equitable distribution award, the trial court or commissioner has an obligation to identify in some way the facts that support the award.

Virginia Code section 20-107.3(A)(3)(f) provides that jointly titled property is presumed to be marital property unless it is retraced to separate property and is not a gift.²⁹⁸ In *Blevins v. Blevins*,²⁹⁹ the wife rebutted the presumption with evidence that the jointly titled \$85,000 certificate of deposit was not intended to be a gift to her husband but to remain her separate property.³⁰⁰ The wife’s parents acquired the certificate of deposit prior to the parties’ marriage and it was intended to be used for the wife’s education.³⁰¹ During the marriage, this certificate of deposit was transferred to the wife and her father.³⁰² Once the father became ill, the certificate was retitled jointly in the wife and husband’s name; however, “the wife testified that she did not intend to make [the certificate of deposit] a gift to her husband.”³⁰³ Additionally, the trial court was able to trace the \$85,000 principal as her separate property.³⁰⁴ Therefore, the Virginia Court of Appeals affirmed the trial court’s decision that the certificate of deposit was the wife’s separate property and that she did not intend to gift it to her husband.³⁰⁵

In *Saxton v. Saxton*,³⁰⁶ the Virginia Court of Appeals affirmed a division of marital assets awarding eighty percent to the wife and twenty percent to the husband.³⁰⁷ Such an unequal division was upheld because the marriage lasted for twenty-two years and the

296. *Id.* at *21.

297. *Id.*

298. VA. CODE ANN. § 20-107.3(A)(3)(f) (Repl. Vol. 2000).

299. No. 2297-01-3, 2002 Va. App. LEXIS 281 (Ct. App. May 7, 2002) (unpublished decision).

300. *Id.* at *8–11.

301. *Id.* at *8.

302. *Id.*

303. *Id.*

304. *Id.* at *8–9.

305. *Id.* at *10–11.

306. No. 3179-01-1, 2002 Va. App. LEXIS 262 (Ct. App. Apr. 30, 2002) (per curiam) (unpublished decision).

307. *Id.* at *12–13.

husband had committed pre-separation adultery.³⁰⁸ The husband had argued unsuccessfully that the unequal award was punitive.³⁰⁹ In practice, such an unequal distribution of assets does not often occur, even in cases of adultery or other marital fault.

In summary, the past year has not resulted in any equitable distribution decisions which significantly affect Virginia law. These decisions are more anecdotal than precedential.

C. Pensions

In *Torian v. Torian*,³¹⁰ the Virginia Court of Appeals addressed the division of a defined benefit Virginia Retirement System ("VRS") pension plan.³¹¹ The court confirmed that there are two methods for valuing and dividing such a pension.³¹² The first method is the deferred distribution approach, requiring division at the time benefits are paid on a monthly basis to the retiree.³¹³ The second method is the immediate offset approach, requiring a present value determination and division of assets immediately.³¹⁴ The VRS pension in this case was a defined benefit plan, not a defined contribution plan.³¹⁵ As a defined benefit plan, it required a determination of the present value of the marital share of the benefits, if there was to be an offset.³¹⁶ The statutory requirement to determine present value for pensions was deleted a decade ago.³¹⁷ Upon the wife's request of an immediate division of the pension, the court of appeals confirmed that the party requesting the division under an immediate offset approach had the burden of proving the present value of the pension.³¹⁸ The wife failed to present sufficient evidence of that value, giving only her statement as to the present value of the pension.³¹⁹

308. *Id.* at *11-12.

309. *Id.* at *4.

310. 38 Va. App. 167, 562 S.E.2d 355 (Ct. App. 2002).

311. *Id.* at 171, 562 S.E.2d at 358.

312. *Id.* at 176, 562 S.E.2d at 360.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 177 n.2, 562 S.E.2d at 361 n.2.

318. *Id.* at 177, 562 S.E.2d at 361; see also *Bowers v. Bowers*, 4 Va. App. 610, 618, 359 S.E.2d 546, 551 (Ct. App. 1987).

319. *Torian*, 38 Va. App. at 179, 562 S.E.2d at 361.

The court made it very clear that the present value need not be determined if the parties are requesting a deferred distribution of the marital share of the pension until a future time when the retiree receives the benefits.³²⁰ Therefore, when a party wants a share of the monthly benefits, if and when the monthly benefits are payable, he or she does not bear the burden of proving the present value of that asset.³²¹ The court of appeals found that the trial court was correct in not making a finding of fact as to the present value of the VRS pension when the wife requested an immediate offset, and the court was also correct in failing to award her any of this asset.³²²

Of additional interest in the *Torian* case was the fact that the parties had been married for over twenty-six years and the court awarded the wife spousal support for a term of merely seven years.³²³ The court of appeals found that such an award was not an abuse of discretion because in seven years the wife could draw from her personal IRA, one of the husband's sources of income would be depleted by that time, and she would only be 59½ years old at that time.³²⁴ Presumably, she was viewed as being employable on a full-time basis at that age.³²⁵

D. Legislative Changes

There were no legislative changes in the equitable distribution area.

VI. GROUNDS OF DIVORCE

One decision handed down recently, *Bchara v. Bchara*,³²⁶ establishes, to some degree, the proof required for spouses who claim to have lived separate and apart for the statutorily prescribed time while living in the same household.³²⁷ In this case, the wife

320. *Id.* at 177, 562 S.E.2d at 360.

321. *Id.* at 177, 562 S.E.2d at 361.

322. *Id.* at 178, 562 S.E.2d at 361.

323. *Id.* at 182, 562 S.E.2d at 363.

324. *Id.* at 183, 562 S.E.2d at 363.

325. *Id.*

326. 38 Va. App. 302, 563 S.E.2d 398 (Ct. App. 2002).

327. *Id.* at 305, 563 S.E.2d at 399; *see also* VA. CODE ANN. § 20-91(A)(9)(a) (Repl. Vol. 2000 & Cum. Supp. 2002).

claimed that the parties had been separated since January 2000.³²⁸ The husband denied such a separation, claiming that at that time they were still continuing to live as a married couple within their mutual marital residence.³²⁹ The Virginia Court of Appeals affirmed the trial court's finding that the separation did occur in January 2000.³³⁰

The trial court based its determination on several factors, including the wife's discovery of a videotape indicating the husband's infidelity.³³¹ Upon that discovery, she moved the husband's personal possessions out of the marital bedroom and into the guest room of the house where the husband continued to sleep.³³² At that time, she also stopped attending family functions with her husband and his family.³³³ She no longer attended church with her husband and stopped depositing money into their joint checking account.³³⁴ She did continue to purchase groceries, cook, do laundry, and clean the house.³³⁵ She also repeatedly asked the husband to leave the marital residence; however, he refused.³³⁶

This evidence of separation was confirmed by a corroborating witness who testified that she had visited the house on a weekly basis and observed the parties living in separate bedrooms.³³⁷ She also testified that the wife had told her that she and her husband were no longer "a couple." The wife also testified that she intended to live separate and apart from her husband as of January 2000.³³⁸ The lack of cohabitation was also established by testimony that the parties no longer engaged in sexual intercourse.³³⁹

The Virginia Court of Appeals found that "continuing to share food and keep a clean house are not behaviors that, as a matter of law, require finding that the parties are living together."³⁴⁰ The

328. *Bchara*, 38 Va. App. at 311, 563 S.E.2d at 402.

329. *Id.* at 310, 563 S.E.2d at 402.

330. *Id.* at 318, 563 S.E.2d at 407.

331. *Id.* at 310, 563 S.E.2d at 402.

332. *Id.*

333. *Id.* at 311, 563 S.E.2d at 402.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* (citing *Chandler v. Chandler*, 132 Va. 418, 428-31, 112 S.E.2d 856, 860-61 (1922)).

court concluded, therefore, that the wife intended to permanently discontinue the marital relationship at the time she moved her husband's belongings into the guest room.³⁴¹ This case is instructive for practitioners who have clients that are eager to establish a separation for purposes of divorce, but have not physically relocated from the marital residence.

VII. PROCEDURE

A. *Pendente Lite Decrees*

There were several recent decisions, including one from the Supreme Court of Virginia, regarding procedure in divorce cases. In *Whiting v. Whiting*,³⁴² the Supreme Court of Virginia reversed the Virginia Court of Appeals in finding that a pendente lite decree remained in effect after entry of the final divorce decree.³⁴³ The court of appeals had found that the decree, which had been entered in violation of Virginia Supreme Court Rule 1:13, was voidable.³⁴⁴ The supreme court found, however, that as a voidable decree, it must be challenged within the twenty-one-day rule found in Virginia Supreme Court Rule 1:1.³⁴⁵ However, on appeal to the supreme court, this issue was not raised.³⁴⁶ Therefore, the divorce decree remained in full force and effect and the pendente lite decree awarding spousal support applied only during the pendency of litigation prior to entry of the final decree.³⁴⁷

B. *Arbitration*

In *Marks v. Marks*,³⁴⁸ the Virginia Court of Appeals reviewed the application of the Uniform Arbitration Act³⁴⁹ to an antenuptial agreement.³⁵⁰ In the antenuptial agreement the parties pro-

341. *Id.*

342. 262 Va. 3 (2001).

343. *Id.* at 4.

344. *Id.* at 3; *see also* VA. SUP. CT. R. 1:13.

345. *Whiting*, 262 Va. at 3; *see also* VA. SUP. CT. R. 1:1.

346. *Whiting*, 262 Va. at 4.

347. *Id.*

348. 36 Va. App. 216, 548 S.E.2d 919 (Ct. App. 2001).

349. VA. CODE ANN. § 8.01-581.01 to -581.016 (Repl. Vol. 2000 & Cum. Supp. 2002).

350. *Marks*, 36 Va. App. at 223, 548 S.E.2d at 922.

vided that any future dispute resolution that could not be mediated would be put to an arbitrator for final determination.³⁵¹ The husband excepted in multiple ways to the arbitrator's award.³⁵² No hearing was ever requested by the husband for his motion to reconsider the arbitrator's award and no ruling was ever made on this motion by the court which approved the arbitrator's award.³⁵³ The husband was found to have failed to abide by the rules set forth in the Uniform Arbitration Act for challenging the errors of an arbitrator's award and for obtaining judicial review.³⁵⁴ The case was affirmed on appeal and remanded for a determination of the wife's attorney's fees and costs.³⁵⁵

C. Sanctions

In *Travis v. Finley*,³⁵⁶ the Virginia Court of Appeals reversed the trial court which had dismissed the mother's petition for modification of custody.³⁵⁷ An earlier decision involving the same parties had reversed the trial court's award of custody to the mother, granting her petition to move with the child to Ghana.³⁵⁸ In the current appeal, the trial court ruled that it would dismiss the mother's petition to modify custody and her petition to show cause because she had failed to answer discovery.³⁵⁹ The mother had pled her Fifth Amendment privilege in response to certain discovery requests.³⁶⁰ The court of appeals, in its most recent decision, found in favor of the mother, holding that the trial court did not have the authority to dismiss the mother's petition as a sanction under Virginia Supreme Court Rule 4:12 because that Rule's sanctions did not apply until an order was entered and violated.³⁶¹ In this case, there was no order, but merely a petition be-

351. *Id.* at 219, 548 S.E.2d at 920.

352. *Id.* at 221-22, 548 S.E.2d at 921-22.

353. *Id.* at 220, 548 S.E.2d at 921.

354. *Id.* at 226-27, 548 S.E.2d at 924; see VA. CODE ANN. § 8.01-581.08 (Repl. Vol. 2000 & Cum. Supp. 2002).

355. *Marks*, 36 Va. App. at 231, 548 S.E.2d at 926.

356. 36 Va. App. 189, 548 S.E.2d 906 (Ct. App. 2001).

357. *Id.* at 193, 548 S.E.2d at 908.

358. *Finley v. Travis*, No. 3060-97-2, 1998 Va. App. LEXIS 522, at *3-4 (Ct. App. Oct. 6, 1998) (unpublished decision).

359. *Travis*, 36 Va. App. at 194, 548 S.E.2d at 909.

360. *Id.* at 196, 548 S.E.2d at 910.

361. See *id.* at 197, 548 S.E.2d at 910; see also VA. SUP. CT. R. 4:12.

fore the court.³⁶² Citing Virginia Code section 8.01-223.1, the court also found that since the mother had claimed her Fifth Amendment privilege in response to discovery requests, the trial court was barred from dismissing her petition.³⁶³

In *Peeverell v. Eskew*,³⁶⁴ discussed previously,³⁶⁵ it should be noted that the Virginia Court of Appeals reversed the decision of the trial court finding that the trial court violated the father's due process rights.³⁶⁶ The court of appeals had entered an order sua sponte prohibiting the parties from placing any further matters on the trial court's docket without its prior consent.³⁶⁷ The trial court's "pre-docketing review requirement" was found to be a violation of the parties' due process rights established under the Fourteenth Amendment of the United States Constitution.³⁶⁸ The court of appeals found, however, that "[t]here is nothing in the record before us evidencing that either party has abused its right to access the trial court's docket in warranting the pre-docketing review. For example, there is no showing of abuse of process or the filing of frivolous pleadings."³⁶⁹ Therefore, the trial court was reversed in its attempt to limit future court filings.³⁷⁰

D. *Preservation of Jurisdiction*

In *Smith v. Smith*,³⁷¹ the Virginia Court of Appeals found that the wife had properly preserved the trial court's jurisdiction to award equitable distribution after entry of its final divorce decree.³⁷² The parties had been divorced by decree in 1998.³⁷³ The decree provided that it was final as to the parties' divorce and that their marriage was dissolved forever.³⁷⁴ The decree in parti-

362. *Travis*, 36 Va. App. at 197, 548 S.E.2d at 910.

363. *Id.* at 202, 548 S.E.2d at 912; see also VA. CODE ANN. § 8.01-223.1 (Repl. Vol. 2000 & Cum. Supp. 2002).

364. No. 0060-01-4, 2002 Va. App. LEXIS 242 (Ct. App. Apr. 23, 2002) (unpublished decision).

365. See *supra* text accompanying notes 210-21.

366. *Peeverell*, 2002 Va. App. LEXIS 242, at *13.

367. *Id.*

368. *Id.* at *14.

369. *Id.* at *16 (citations omitted).

370. *Id.*

371. 38 Va. App. 113, 562 S.E.2d 329 (Ct. App. 2002).

372. *Id.* at 114, 562 S.E.2d at 330.

373. *Id.*

374. *Id.*

nent part also stated that "matters requiring equitable distribution of marital property pursuant to Virginia Code section 20-107.3 are hereby deferred for further adjudication as allowed by Virginia Code section 20-107.3."³⁷⁵

Discovery took place for thirty-four months after the entry of this divorce decree.³⁷⁶ The wife moved for an equitable distribution hearing in January 2001.³⁷⁷ The husband filed a plea of lack of jurisdiction and a motion to quash which was granted by the trial court.³⁷⁸ The court of appeals found that the wife had properly requested a decision of equitable distribution in the third paragraph of her answer to the complaint.³⁷⁹ The divorce decree contained her reservation of the right to equitable distribution and, therefore, the trial court erred in holding that it lacked jurisdiction to award equitable distribution under these circumstances.³⁸⁰

E. Adoption

Over the past year, two important cases regarding the adoption of children whose parents were in prison were decided.³⁸¹ In *Crockett v. McCray*,³⁸² the Virginia Court of Appeals reversed the final order of adoption upon the natural mother's objection.³⁸³ The natural mother placed the child with the adoptive parents when the child was four months old.³⁸⁴ The child had been living with the adoptive parents for four years when they petitioned for adoption.³⁸⁵ The natural mother had spent most of the child's life in prison.³⁸⁶ She prevailed in her objection to the adoption on the grounds that the reports and orders entered in the matter demonstrated that the statutory visits by the Department of Social

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.* at 116-17, 562 S.E.2d at 331.

380. *Id.*

381. See *Crockett v. McCray*, 38 Va. App. 1, 560 S.E.2d 920 (2002); *Reed v. Hersam*, No. 0466-01-4, 2001 Va. App. LEXIS 483 (Ct. App. Aug. 14, 2001) (unpublished decision).

382. *Crockett*, 38 Va. App. 1, 560 S.E.2d 920.

383. *Id.* at 2-3, 560 S.E.2d at 921.

384. *Id.* at 3, 560 S.E.2d at 921.

385. *Id.*

386. *Id.* at 4, 560 S.E.2d at 921.

Services did not appear to have taken place.³⁸⁷ Virginia Code section 63.1-219.19 requires three visits by the Department of Social Services.³⁸⁸ The court of appeals found that it was not error, however, for the trial judge to refuse on remand the mother's request for visitation with the child.³⁸⁹

In *Reed v. Hersam*,³⁹⁰ another case involving an inmate's objection to adoption, the Virginia Court of Appeals in its per curiam decision affirmed the adoption, finding that the incarcerated father withheld his consent to the adoption contrary to the best interests of the child.³⁹¹ It appears from these two cases that an inmate who is not involved in his or her child's life could lose his or her parental rights.

F. Miscellaneous

*Dorer v. Siddiqui*³⁹² makes it clear that the circuit court's concurrent jurisdiction pursuant to Virginia Code section 20-79(c) does not cease when it transfers enforcement of its support orders to the juvenile and domestic relations court.³⁹³ The circuit court has concurrent jurisdiction to rule on any show cause proceedings filed with it despite the transfer of enforcement to the lower juvenile court.³⁹⁴ Therefore, the circuit court may transfer to the juvenile court any case where there is concurrent jurisdiction.³⁹⁵

In conclusion, on procedural matters this past year, the appellate opinions confirmed that pendente lite decrees expire with entry of a final decree.³⁹⁶ The Virginia Court of Appeals also ruled that sanctions against a party asserting a Fifth Amendment privilege are inappropriate.³⁹⁷ Finally, if the parties elect to util-

387. *Id.* at 6-8, 560 S.E.2d at 922-23; *see also* VA. CODE ANN. § 63.1-219.19 (Cum. Supp. 2002).

388. VA. CODE ANN. § 63.1-219.19.

389. *Crockett*, 38 Va. App. at 9-10, 560 S.E.2d at 924.

390. No. 0466-01-04, 2001 Va. App. LEXIS 483 (Ct. App. Aug. 14, 2001) (unpublished decision).

391. *Id.* at *1.

392. No. 0974-01-4, 2002 Va. App. LEXIS 165 (Ct. App. Mar. 19, 2002) (unpublished decision).

393. *Id.* at *4; *see also* VA. CODE ANN. § 20-79(c) (Repl. Vol. 2000 & Cum. Supp. 2002).

394. *See id.* at *5-7; VA. CODE ANN. § 20-79(c).

395. *See id.* at *5; VA. CODE ANN. § 20-79(c).

396. *See supra* Part VII.A.

397. *See supra* Part VII.C.

ize binding arbitration, then the Uniform Arbitration Act must be followed.³⁹⁸

G. *Miscellaneous Legislative Changes*

1. Interlocutory Appeals

In the field of family law, many pendente lite or interlocutory orders can have a significant or dramatic impact on the outcome of a case. On its face, a new statute allowing interlocutory appeals to the Virginia Court of Appeals seems to change that result.³⁹⁹ However, closer scrutiny of the exact terms of this statute indicate that it will be rarely utilized in the family law arena.

This amendment allows for an interlocutory appeal to the court of appeals in limited circumstances.⁴⁰⁰ A "party may file in the circuit court a statement of the reasons why an immediate interlocutory appeal should be permitted."⁴⁰¹ This statement shall set forth a concise analysis of the rules of court, statutes, or case law determinative of the issues.⁴⁰² Further, the statement must request a trial court to certify that the issue involves a question of law upon which:

(i) there is substantial grounds for difference of opinion, (ii) there is no clear controlling precedent point . . . (iii) determination of the issues will be dispositive of a material aspect of the proceeding currently pending before the court, and (iv) the court and the parties agree it is in the parties' best interest to seek an interlocutory appeal.⁴⁰³

It is worth noting that the consent of both the litigants and the court is required, thereby greatly reducing the chances of numerous appeals in the family law area.⁴⁰⁴ It is likely that subject matter jurisdictional issues or the validity of agreements will be the issues most likely to be heard pursuant to this new statute.

398. See *supra* Part VII.B.

399. VA. CODE ANN. § 8.01-670.1 (Cum. Supp. 2002).

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

Procedurally, once there is a certification by the trial court, the petitioner has ten days to file a petition with the court of appeals.⁴⁰⁵ The standard for the appellate court is a discretionary one.⁴⁰⁶ No petitions or appeals shall stay the proceedings in the circuit court unless the circuit court or the court of appeals so orders.⁴⁰⁷ Therefore, the practitioner need not worry that a typical pendente lite order granting temporary custody, spousal support, child support, attorney's fees, and exclusive use and possession of a marital residence will be granted an interlocutory appeal.

2. Protective Orders

Various statutes were amended by Senate Bill 518,⁴⁰⁸ which provides in essence that the name, address, telephone number and place of employment of a person protected by a protective order shall not be disclosed by a law enforcement agency, attorney for the Commonwealth, Clerk of Court, nor employees of any of the above, unless required by law or necessary for law enforcement purposes or permitted by the court for good cause.⁴⁰⁹ The intent of this provision seems to provide additional anonymity and security for the person who is protected by such an order and to insure to the extent possible that the person is not harassed or abused in any way.

3. Impact of Domestic Violence Orders on a Concealed Weapon Permit

A dispute arose concerning the use of concealed weapon permits when a domestic violence protective order has been issued. This confusion was clarified when the General Assembly amended Virginia Code section 18.2-308.1:14.⁴¹⁰ The statute subjects a person who has a concealed weapons permit to the restric-

405. *Id.*

406. *Id.*

407. *Id.*

408. S.B. 518, Va. Gen. Assembly (Ex. Sess. 2002) (enacted as Act of Apr. 5, 2002, ch. 508, 2002 Va. Acts 179) (codified at VA. CODE ANN. §§ 16.1-253, -253.1, -253.4, -279.1, 17.1-272 (Cum. Supp. 2002)).

409. *Id.*

410. VA. CODE ANN. § 18.2-308.1:4 (Cum. Supp. 2002).

tions of a domestic violence protective order.⁴¹¹ Further, this person is prohibited from carrying any concealed weapon and shall surrender the permit to the court entering the protective order for the duration of such order.⁴¹²

4. Family Abuse and Marital Rape Expanded

Most people will view the changes made to the penalties for domestic violence and marital rape as beneficial.⁴¹³ However, some will view them as a dangerous governmental incursion into the lives of married couples and will also bemoan the potential for frivolous complaints. First, some have considered this to be some of the most important legislation to be passed in this last session. Many women's groups have long fought for an expansion of the definition of marital rape and finally achieved success this year. The amendment removes the provision that marital rape cannot occur unless the spouses are living apart or bodily injury occurs.⁴¹⁴

Further, the legislation redefines "family abuse" to include reasonable apprehension of bodily harm rather than "serious" bodily harm.⁴¹⁵ The trend in the Commonwealth and in the country has been to take a more vigorous standing against family abuse. This is a laudable goal, however, it must be realized that on occasion overreaching and strategic complaints can be made. Strategic complaints arise when one is attempting to seek advantage in civil litigation. It certainly is more difficult to prove serious bodily harm than a reasonable "apprehension" of bodily harm. Our courts will no doubt define reasonable apprehension of bodily harm quite differently. Herein lies the genesis of potential mischief. Hopefully, the courts will take precautions to insure that targets of such claims are not the subject of unwarranted proceedings.

411. *Id.*

412. *Id.*

413. Compare VA. CODE ANN. § 16.1-228 (Cum. Supp. 2002), and *id.* § 18.2-61 (Cum. Supp. 2002), with *id.* § 16.1-228 (Repl. 1999), and *id.* § 18.2-61 (Repl. Vol. 1996).

414. *Id.* § 18.2-61 (Cum. Supp. 2002). For further discussion of this legislation, see Julie McConnell, et al., *Annual Survey of Virginia Law: Criminal Law*, 37 U. RICH. L. REV. 45, 86 (2002).

415. *Id.* § 16.1-228 (Cum. Supp. 2002).

5. Right to Breast Feed

Legislation was passed that guarantees the right of any woman to breast feed her child at any location on state property.⁴¹⁶ Although the authors of this article are strong advocates of breast feeding, it is unclear as to why it was necessary to pass a bill to this effect. We certainly hope that there was no opposition to it. Nonetheless, the young mothers of the Commonwealth should feel relieved.

6. Computer Trespass and Violations

This amendment should fall under the heading of “no good deed goes unpunished.” One of the authors of this article convinced the VBA Coalition Committee on Family Law Legislation to submit an amendment⁴¹⁷ to the present computer trespass statute because of past experiences. Numerous circuit court cases have involved a spouse’s discovery and downloading of e-mails on the home computer from the other spouse to his or her paramour.⁴¹⁸ Several judges from Northern Virginia, experienced in computer litigation, opined that such activities may be a violation of the criminal computer trespass statute.⁴¹⁹ It was, therefore, thought that a revision of the statute was needed in order to clarify that one spouse was not guilty of a crime for merely downloading e-mail letters evidencing the other spouse’s infidelity. In our mind, this was akin to discovering a box of love letters locked away in a closet. Certainly, no one would consider that discovery to be a crime, and the elevation of computers to a deified status by the General Assembly and courts seems to be unwarranted and unwise.

Unfortunately, when the amendment was submitted to the General Assembly to exempt one spouse from being prosecuted for such an activity, the General Assembly amended it so that it only applied to a parent supervising or monitoring the e-mail of

416. VA. CODE ANN. § 2.2-1147.1 (Cum. Supp. 2002).

417. H.B. 304, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Mar. 22, 2002, ch. 195, 2002 Va. Acts 198) (codified at VA. CODE ANN. § 18.2-152.4 (Cum. Supp. 2002)).

418. *See, e.g.,* Streeseman v. Streeseman, No. CH98-485, 2000 Va. Cir. LEXIS 116 (Cir. Ct. Sept. 26, 2000) (Spotsylvania County) (unpublished decision).

419. VA. CODE ANN. § 18.2-152.4 (Cum. Supp. 2002).

their child.⁴²⁰ The problem with limiting the amendment in this way is that a misguided court could draw a “negative inference” that the statute does in fact apply to a spouse who discovers e-mail on the home computer from the other spouse to a paramour. Hopefully, the courts of the Commonwealth will not take this draconian view and draw this negative inference.

VIII. CONCLUSION

This year did not see any major changes in the area of family law. The Virginia Court of Appeals and Supreme Court of Virginia have confused practitioners on the issue of enforceability of self-executing child support agreements of divorcing parties. Next year may provide clarification.

420. *Id.* §18.2-152.4(D).